

24TH FEDERAL LITIGATION COURSE

SCOPE OF REVIEW

I. ENLISTMENT CONTRACTS.

- A. Standard: Traditional contract principles. *Peavy v. Warner*, 493 F.2d 748 (5th Cir. 1974).
- B. The problem of recruiter representations. Compare *Helton v. United States*, 532 F. Supp. 813 (S.D. Ga. 1982), and *Withum v. O'Connor*, 506 F. Supp. 1374 (D.P.R. 1981), with *McCracken v. United States*, 502 F. Supp. 561 (D. Conn. 1980).
- C. Remedy: Cure or Rescission. *Pence v. Brown*, 627 F.2d 872 (8th Cir. 1980); *Allen v. Weinberger*, 546 F. Supp. 455 (E.D. Mo. 1982); *Mansfield v. Orr*, 545 F. Supp. 118 (D. Md. 1981). Cf. *Schneble v. United States*, 614 F. Supp. 78 (S.D. Ohio 1985).

II. CONSCIENTIOUS OBJECTOR DETERMINATIONS.

- A. Decisional Framework: (AR 600-43)
- B. Standard: Basis-in-Fact. *Estep v. United States*, 327 U.S. 114 (1946); *Woods v. Sheehan*, 987 F.2d 1454 (9th Cir. 1993); *Wiggins v. Secretary of the Army*, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991); *Koh v. Secretary of the Air Force*, 719 F.2d 1384 (9th Cir. 1983), rev'g, 559 F. Supp. 852 (N.D. Cal. 1982).

III. DISCRETIONARY DECISIONS.

- A. Applicable Standards. See generally *California v. Bennett*, 843 F.2d 333 (9th Cir. 1988); *Cranston v. Clark*, 767 F.2d 1319, 1320-21 (9th Cir. 1985).
 - 1. Substantial Evidence: Evidence a reasonable mind might accept as adequate to support a conclusion. It can be somewhat less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence doesn't prevent the agency's finding from being supported by substantial evidence.
 - 2. Arbitrary and Capricious: A highly deferential standard that determines

whether the decision was based on relevant factors and whether there was a clear error in judgment.

B. Illustrative Cases.

1. BCMR and BCNR decisions.
 - a. Decision to deny a hearing. *Kalista v. Secretary of the Navy*, 560 F. Supp. 608 (D. Colo. 1983).
 - b. Decision to deny relief. *White v. Secretary of the Army*, 878 F.2d 501 (D.C. Cir. 1989); *Burns v. Marsh*, 820 F.2d 1108 (9th Cir. 1987); *Wronke v. Marsh*, 787 F.2d 1569 (Fed. Cir.), cert. denied, 479 U.S. 853 (1986); *Koster v. United States*, 685 F.2d 407 (Ct. Cl. 1982); *Mahoney v. United States*, 610 F. Supp. 1065 (S.D.N.Y. 1985); *Fairchild v. Lehman*, 609 F. Supp. 287 (E.D. Va. 1985), aff'd, 814 F.2d 1555 (Fed. Cir. 1987).
 - c. Interpretation of agency regulations. *Falk v. Secretary of the Army*, 870 F.2d 941 (2d Cir. 1989); *Benvenuti v. Department of Defense*, 613 F. Supp. 308 (D.D.C. 1985), aff'd, 802 F.2d 469 (Fed. Cir. 1986).
 - d. Secretary's decision on Correction Board recommendation. *Miller v. Lehman*, 801 F.2d 492 (D.C. Cir. 1986); *Selman v. United States*, 723 F.2d 877 (Fed. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Boyd v. United States*, 207 Ct. Cl. 1 (1975), cert. denied, 424 U.S. 911 (1976).
2. Medical fitness determinations. *Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983); *deCicco v. United States*, 677 F.2d 66 (Ct. Cl. 1982); *Sidoran v. Commissioner*, 640 F.2d 231 (9th Cir. 1981).
3. Separation of Military and Naval Academy cadets. *Dougherty v. Lehman*, 688 F.2d 158 (3d Cir. 1982), aff'g, 539 F. Supp. 4 (E.D. Pa. 1981); *Love v. Hidalgo*, 508 F. Supp. 177 (D. Md. 1981).
4. Barring persons from post. *Berry v. Bean*, 796 F.2d 713 (4th Cir. 1986); *Serrano-Medina v. United States*, 709 F.2d 104 (1st Cir. 1983), aff'g, 539 F. Supp. 719 (D.P.R. 1982); *Tokar v. Hearne*, 699 F.2d 753 (5th Cir.), cert. denied, 464 U.S. 844 (1983).

5. Decisions under the Missing Persons Act. *Luna v. United States*, 810 F.2d 1105 (Fed. Cir. 1987); *Cherry v. United States*, 697 F.2d 1043 (Fed. Cir. 1983); *Pitchford v. United States*, 666 F.2d 533 (Ct. Cl. 1981).
6. Hardship discharges. *Jackson v. Allen*, 553 F. Supp. 528 (D. Mass. 1982).

IV. VIOLATIONS OF STATUTES AND REGULATIONS.

- A. General. Deference is afforded to the agency's interpretation of its regulations and the statutes it is responsible for interpreting. *Udall v. Tallman*, 380 U.S. 1 (1965); *Wronke v. Marsh*, 787 F.2d 1569 (Fed. Cir.), cert. denied, 479 U.S. 853 (1986). Cf. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).
- B. Violations of Statutes and Regulations. E.g., *Harmon v. Brucker*, 355 U.S. 579 (1958); *Barnett v. Weinberger*, 818 F.2d 953 (D.C. Cir. 1987); *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979).
- C. Prerequisites to the enforcement of statutory or regulatory provisions.
 1. The statute or regulation must be for the benefit of the individual ("zone-of-interests"). *Silverthorne v. Laird*, 460 F.2d 1175 (5th Cir. 1972); *Hadley v. Secretary of the Army*, 479 F. Supp. 189 (D.D.C. 1979).
 2. The violation must substantially prejudice the plaintiff. Compare *Knehans v. Alexander*, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978), with *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

V. CONSTITUTIONAL VIOLATIONS.

- A. Due Process. See, e.g., *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972).
- B. Substantive Violations.
 1. General: Deference to military concerns. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986); *United States v. Albertini*, 472 U.S. 675 (1985); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Brown v. Glines*, 444 U.S. 348 (1980).

2. Standard of review: Military policies presumptively constitutional if reasonably relevant and necessary to further national defense. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); *Goldman v. Secretary of Defense*, 734 F.2d 1531 (D.C. Cir. 1984), aff'd sub nom. *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Mack v. Rumsfeld*, 609 F. Supp. 1561 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986).

VI. INADEQUATE ADMINISTRATIVE RECORDS.

- A. General.
- B. Supplement in the Court. *Simmons v. Marsh*, 564 F. Supp. 379 (D.D.C. 1983); *Bray v. United States*, 515 F.2d 1383 (Ct. Cl. 1975).
- C. Remand to the Agency. *Roelofs v. Secretary of the Army*, 628 F.2d 594 (D.C. Cir. 1980); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978).

VII. APPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT (APA).

- A. APA is Applicable to the Military. *Ornato v. Hoffman*, 546 F.2d 10 (2d Cir. 1976).
- B. Exceptions:
 1. Courts-martial and military commissions.
 2. Military authority exercised in the field in the time of war or in occupied territory.
- C. Scope of Review. 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

1. Compel agency action unlawfully withheld or unreasonably delayed; and
2. Hold unlawful and set aside agency action, findings, and conclusions found to be--
 - a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- b. contrary to constitutional right, power, privilege, or immunity;
- c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- d. without observance of procedure required by law;
- e. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- f. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

- D. Compare the APA standard to the legal standard of review for military correction board decisions:

A plaintiff is bound by the ABCMR's determination unless he establishes that the determination was arbitrary and capricious, contrary to law, or unsupported by substantial evidence [citations omitted] and unless he does so by cogent and clearly convincing evidence. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986).

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